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SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 324

ANTHONY ALTIERI, JR.,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The Petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the First Circuit, entered on June 9, 1966, which affirmed the judgment entered February 4, 1966 by the United States District Court for the District of Rhode Island.

Opinions Below

The judgment of the Court of Appeals for the First Circuit is thus far unreported and is reprinted as Appendix A of this petition. The Court did not file an opinion. The opinion of the District Court for the District of Rhode Island (Day, Judge) is reprinted in Petitioner's Record Appendix at page 1a.

Jurisdiction

The jurisdiction of this Court is invoked under 28 United States Code, Section 1254(1).

Questions Presented

1. Did the remarks of the United States Attorney, which overly emphasized the alleged source of the income rather than the income tax evasion constitute harmful error as the remarks were biased and prejudicial?

2. Did the remarks of the Trial Judge, which emphasized the alleged source of income as presented by the United States Attorney constitute harmful and reversible error as the said remarks were biased and prejudicial?

3. Did the Trial Judge deny the Petitioner due process by considering and emphasizing the alleged source and the amount of income rather than staying within the charge of the indictment?

4. Did the constant reference to the alleged source and amount of income by the United States Attorney and the Trial Judge constitute harmful and reversible error and deny the Petitioner due process when in fact the Petitioner has never admitted to such activity to a federal or state officer nor has he ever been convicted for this alleged source of income and this will be further supported by an affidavit (Appendix A)?

5. Did the remarks of the United States Attorney as to

the expenses which would offset this income constitute prejudicial and harmful error as the remarks were not based upon actual facts?

6. Did the remarks of the Trial Judge which emphasized the source of income amount to an imposing a double penalty or the possibility of a double penalty on the Petitioner since it appears that the Judge is putting this alleged activity in the category of a federal crime?

7. Did the remarks of the Trial Judge, which were that had he gone to trial he undoubtedly would be found guilty by a Jury, manifest biasness and prejudiceness and constitute reversible error?

Constitutional Provision Involved

The Fifth Amendment of the Constitution of the United States which reads as follows:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty or property, without due process of law, . . ."

Statutes Involved

The statutory provisions involved are

> 18 U.S.C.A. Rule 32(c) (1); 26 U.S.C.A. Section 7201; 26 U.S.C.A. Section 7206; 28 U.S.C.A. Section 1254(1) they are printed in Appendix B *infra* pp. 38

Statement of the Case

The Grand Jury for the District of Rhode Island returned and filed an indictment on December 3, 1965 against

the Petitioner Anthony Altieri, Jr., containing three counts. Also charged in the same indictment were two counts against his mother, Mrs. Jennie DeCubellis. The five counts in the indictment all alleged wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America. When the Petitioner was arraigned on January 7, 1966, he pleaded guilty to Count III of the indictment and not guilty to Counts I and II. The Trial Judge sentenced the Petitioner to fifteen (15) months imprisonment and imposed a $5,000-.00 fine on him on February 4, 1966. On February 9, 1966, the Petitioner filed in the District Court of the United States for the District of Rhode Island notice of appeal to the United States Court of Appeals for the First Circuit. On June 7, 1966, the cause was orally argued before the Court of Appeals for the First Circuit with Honorable Bailey Aldrich, Chief Judge, and Honorable Edward M. McEntee and Honorable Frank M. Coffin, Circuit Judges, sitting. On June 9, 1966, the judgment affirming the judgment of the District Court was entered and it is to be noted that there was no opinion filed. Thereafter on June 15, 1966 the Petitioner's motion to stay mandate was granted and it was ordered that the said mandate be stayed.

Reasons For Granting the Writ

First: The Remarks of the United States Attorney Were In and Of Themselves Biased, Prejudicial and Constituted Harmful Error By Emphasizing the Source of the Income Rather Than the Income Tax Evasion.

Upon an examination of the record, it is clearly evident that the United States Attorney was more concerned with the alleged source of income rather than the attempt to wilfully evade the tax on earned income. He states:

"It is true that the indictment recites a violation of the Internal Revenue Code. However, an element of proof in such a charge is that the income set forth in the accusation is in fact earned income. The records maintained by the defendant and the witnesses who signed affidavits for the Internal Revenue Service and testified before the Grand Jury *proved beyond a scintilla of doubt that Mr. Altieri's business was what might be termed an abortion mill, thriving indeed in 1963 with 249 abortions performed for which the unfortunate girls involved* paid fees ranging from $250.00 to $1300.00 in each case. The total of these cases alone, may it please the Court, for the single year of 1963 amounted to $97,752.10. The accused's 249 business entries were most detailed, listing the names, the ages, and many other pertinent particulars of each patient. And I must say—I am constrained to say—*I use the word, 'patient' in quotes.* It shows the exact sum received and received in each case. These were also most accurately recorded.

'The operation, your Honor, was of great scope, covering the New England area, New York State, and Washington, D.C.'." (page 3a-4a) (emphasis ours)

It is our view that this causal reference to a violation of the Internal Revenue Code as is charged in the indictment and then emphasizing quite strongly the alleged source of income, in effect shows that it was the United States Attorney's primary concern to have the Petitioner punished for the alleged source of income rather than for tax evasion. In his inflamatory plea and his ultra-concern for this type of activity, we suggest that the United States Attorney had little concern for the elements of attempted tax evasion but rather was attempting to flog the Petitioner for this

alleged activity under the guise of a tax evasion charge. This is further evidenced by the inaccurate reference to the section of the Internal Revenue Code involved, as section 7206 is cited, whereas in fact section 7206 is not contained within Count III of the Indictment. Our aim in directing the Court's attention to this obvious error is not for the purpose of harassing the Court with technicalities, but rather to demonstrate to the Court that the United States Attorney was far less concerned with the charge of the indictment and more concerned with using this indictment to strike at the alleged illegal activity. We strongly feel that harmful error has been committed by the Government in taking this position before the Court. As Circuit Judge McEntee pointed out in a perjury case, *LaPlaca* v. *United States,* 354 F2d 56, (CA 1st Cir. 1965), that, "While objective facts may be proved directly, the state of a man's mind must be inferred from the things he says or does, *United States* v. *Remington,* 191 F2d 246,247 (CA 2nd Cir. 1951)." In this spirit, the remarks of the United States Attorney demonstrate, "beyond a scintilla of doubt," as the United States Attorney so aptly phrased it, that he was more concerned with establishing as a matter of fact, that the Petitioner was involved in a criminal activity, even though this alleged activity does not constitute a crime under Federal Law. We feel that the position taken by the Government was designed to inflame the mind of the Trial Judge and inflame it to the extent of imposing a penalty on the Petitioner for this alleged activity. In effect, by presenting the plea in this manner, the Government effectively drew the mind of the Judge away from the real issue, that of attempting to wilfully evade income tax, which is the only charge that the Petition had pleaded guilty to, and punished him for this alleged illegal activity.

We would like to direct the Court's attention to the case

of *United States* v. *Pendergast*, 28 F Supp 601 (DC WD Mo. 1939) which goes directly to the issue of source of income. This case will be developed under Point Two as it is more applicable to the factors for consideration by the Trial Judge when imposing sentence. However, in essence, it holds for the proposition that in tax evasion cases, when there has been a plea of guilty, the source of income should be removed as a factor in determining the severity of the sentence. Likewise with regard to the cause presented, the alleged illegal activity was not part of the indictment nor had the Petitioner in any way intimated that he had in any way partaken in such activity.

We further contend that all of the accusations against the Petitioner were based on hearsay information. According to the United States Attorney the allegations as to the source of income and the amount of money were based on the Petitioner's own records and affidavits signed by witnesses. This clearly demonstrates hearsay information subject to proof as well as rules of evidence had this gone to trial. It is our position, that the accusations being outside the realm of fact any being strictly hearsay should not have been made, but since they have been made reversible error has been committed. We have taken the position that had this gone to trial the arguments presented on behalf of the Government concerning the source of income would not have been allowed, therefore now that the Petitioner has pleaded guilty to one count of tax evasion, this material should not be permitted to be used in determining the degree of punishment. Our position is that as is in the *Pendergast* case, *supra*, as Judge Otis states, the source of income should not be brought in for consideration in determining the sentence to be imposed. In the *Pendergast* case, *supra*, the illegal activity was of known fact, while in this case, the alleged illegal activity is mere accusation based on hearsay information which suggests that it

should be further removed from consideration for the purpose of determining the sentence to be imposed on a tax evasion charge.

The position that we have taken with regard to the remarks of the United States Attorney is in essence that the Petitioner is being punished for being an all around bad fellow and the tax evasion is only the vehicle to carry the other charges. We feel that the plea was so inflamatory and emotional that the Judge adopted this position as evidenced by his remarks to the detriment of the Petitioner. It has been held that where the Petitioner has pleaded guilty to a charge he cannot come back later and question the evidence that supported the indictment, as the sentence is based on the plea, not the evidence. *United States* v. *Miller,* 254 F2d 523 (CA 2nd Cir. 1958) citing *United States* v. *Gallagher,* 183 F2d 342 (CA 3rd Cir. 1950). It seems to follow that since the Petitioner has pleaded guilty to a particular charge in an indictment, the sentence should be imposed to that charge and not to the alleged conduct which portrays illegal activity, and further has not been established as a valid matter of fact.

The alleged information in the hands of the Government was extremely prejudicial to the Petitioner and by the Government using this as a basis for establishing the sentence to be imposed, put the Petitioner in an extremely awkward position of not being able to qualify and question the remarks of the United States Attorney according to the rules of evidence. Further, as stated in *Armpriester* v. *United States,* 256 F2d 294 (CA 4th Cir. 1958):

> "Nevertheless, we would not condone the use of evidence obtained in breach of the law, even for the limited purpose of determining the sentence."

In this context, we are not asking for an evidentiary hearing to establish the truth and veracity of the accusa-

tion, but rather, we contend that the information which is acknowledged to be hearsay, should not be used to set the standard for imposing sentence on the Petitioner.

With regard to this first issue, we contend that the remarks of the United States Attorney went far afield. Not only was it error for him to refer to the alleged source of the income, but further his remarks heavily influenced the Judge when he ultimately imposed sentence, which will be demonstrated in the following issue. The remarks were in and of themselves, careless and irresponsible, which resulted in presenting an extremely biased and prejudical picture of the Petitioner, thus causing harmful error.

The indictment charged the Petitioner with attempting to wilfully evade income tax, to which he had pleaded guilty based on his own reasons. However, there is nothing in the indictment charging the Petitioner with the alleged illegal activty, nor could there be such a charge contained therein as this activity is not a crime under Federal Law. Let us point out for the record, that the district court does not have jurisdiction to impose judgment and sentence on a plea of guilty to an indictment for a crime not existing under Federal Law, *United States* v. *Gallagher,* 94 F Supp. 640 (DC WD Pa. 1950). By this we are not claiming that the indictment is faulty, but that the passionate and emotional accusations made on behalf of the Government against the Petitioner imposed an additional element into the indictment, and this element consisted of the non-federal offense of abortion. Further, that this passionate plea was so strong that it created biasness and prejudice to the detriment of the Petitioner as this was a controlling factor in establishing the fine at $5,000.00 and the sentence at fifteen (15) months. The prejudice that was lacking in *Armpriester* v. *United States, supra,* certainly is in evidence here. In that case, the decision of the lower court was affirmed and the Court remarked that;

"the existence of a statement was merely alluded to incidentally after the plea . . .

"Nor, could anything in the inspectors remarks, which is now objected to, possibly have influenced the length of the sentence, for the details of the offenses were not revealed thereby, but were adduced independently. We cannot perceive any possible prejudice to the Appellant."

In this case, the remarks of the United States Attorney went right to an emotional point, to the alleged mode of operation in slanderous detail. The emphasis was in fact so heavily applied that the Petitioner received great harm and his standing before the Court for sentencing was highly prejudiced in the mind of the Trial Judge.

For these reasons, we feel, that the remarks of the United States Attorney were careless, wanton and reckless causing the Petitioner great harm, and we feel that the harm amounted to reversible error.

Second: The Remarks of the Trial Judge Demonstrate That He Was Biased and Prejudicial Against the Petitoner Because of the Alleged Source of Income and As Such Indicated That He Had Adopted the Presentation of the United States Attorney, Therefore Committed Harmful and Prejudicial Error.

Once again paraphasing Circuit Judge McEntee in *La-Placa* v. *United States, supra,* ". . . the state of man's mind must be inferred from the things he says or does." In this framework, the remarks of the Trial Judge indicate the influence that the reference to the source of income had on him. He states:

"It is obvious to the Court a very substantial amount of money was involved here. The reason for the false returns are crystal clear: at first perhaps to evade whatever tax he would have to pay on that income, *but more than that, to conceal a detestable and diabolic source of the income that he realized.*

"... True, by his plea of guilty he saved the weak individuals who went to him for so-called treatment, from appearing publicly and displaying their weakness. That is an element I will give some consideration to, but nonetheless, it would not warrant me in extending any leniency to this Defendant under all the circumstances of this case. I quite agree with the District Attorney this is a case that calls for the imposition of a jail sentence. In the light of the amount involved and *the source of that income,* the Court feels anything short of that would be a miscarriage of justice." (page 9a) (emphasis ours)

The position that we have taken concerning the aforesaid remarks of the Trial Judge is that he has committed prejudicial error by referring to the alleged source of income in the manner and form presented and as such has committed reversible error. Since he clearly emphasized the source of income it is obvious that he had fully adopted the presentation of the United States Attorney and we contend that this is an improper standard employed in determining the sentence. As we stated earlier, all of the accusations made against the Petitioner concerning the alleged source of income was based on hearsay information and it is very doubtful that this would have come out into exposure had this gone to trial.

The Court should take special notice of *United States* v. *Pendergast,* 28 F Supp 601 (DC Mo. 1939) which is still

good law today. In that case the Defendant (Boss Pendergast) pleaded guilty to a tax evasion charge and the source of income was, as a matter of fact not hearsay, bribe money. The defendant was a "Party Boss" and the public reaction was very high and strong for revenge. Judge Otis in a very scholarly opinion discussed at great length the problems he faced in determining what sentence to impose on Pendergast. He stated;

> "that the penalty carried a maximum of five years imprisonment and a fine of $10,000.00. That Congress has said that in the case of attempted evasion which the circumstances reach the maximum of possible aggravation, the punishment shall be five years' imprisonment and a fine of $10,000.00 The aggravating circumstances conceivable in an attempted tax evasion case are: (a) that the Defendant intended to cheat the Government of a large, not a trifling amount; (b) that the Defendant has been a persistent tax evader; (c) that the Defendant, in a case in which guilt finally is proved, has put the Government to enormous expense to prove his guilt, and perhaps has added perjury to the offense charged against him." United States v. Pendergast, supra at page 609.

Judge Otis further states, on page 609;

> "Certainly it is within the discretion of the judge to make the sentence small or great in accordance with the mitigating or aggravating circumstances of the crime. But the circumstances which may affect the sentence must be circumstances connected with the crime. For example, if an attempt to evade the tax succeeds previous attempts, admitted or proved, or other previous crimes admitted or proved, there is an

aggravating circumstance that should affect the punishment. Again, if the attempt to evade the tax involves substantial amounts, that is an aggravating circumstance which should affect the punishment. *But it is absurd to say that the source from which a citizen receives income, however bad, or the purpose for which he receives it, however evil, is an aggravating circumstance of an attempt by him to avoid payment of an income tax. The two things have no connection whatsoever.*" (emphasis ours)

With regard to the case before the Court, the fact that so much emphasis was placed on the alleged source of income by the United States Attorney, which was fully adopted by the Trial Judge as he referred to the alleged source as *diabolic* and *detestable,* and he imposed the sentence upon the fact that he had placed much emphasis on the amount and source of income, demonstrates the bias and prejudice of the Trial Judge as well as the fact that he used an improper criteria in establishing his standard for the imposition of a sentence. We closely follow the views of Judge Otis and feel that these views demonstrate a very responsible approach to administering justice. He fully justified his decision and demonstrated the rationale behind it. The same cannot be said for the decision against the Petitioner as emotional criteria outweighed the rational view. We strongly feel that the facts at hand fall closely in line with the matter in the *Pendergast* case. Certainly, a more concrete and less emotional standard can and should be established to serve justice more fully in the case at bar.

We direct the Court's attention to *Townsend* v. *Burke,* 334 US 736 (1948). It is not our contention to raise the question of competency of counsel as an issue, which is the major concern of the *Townsend* v. *Burke* case, *supra,* but

to demonstrate how undue emphasis on misinformation or hearsay material, which should be removed from the presentation, can prejudice the mind of the judge and influence the sentence imposed by his decision. It is further pointed out that, "it is not the duration or severity of the sentence that renders it constitutionally invalid, it is the careless or designed pronouncement of sentence on a foundation so extensively and materially false . . ." *Townsend* v. *Burke, supra* at page 741. Based on this foundation, it is our contention that there is an element of a denial of due process in the manner that the Trial Judge imposed the sentence in the case at bar. We strongly feel that in effect he has enlarged the scope and coverage of the indictment to the detriment of the Petitioner, in violation of his constitutional right of due process as guaranteed to him under the fifth amendment of our Constitution.

The fifth amendment reads as follows:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty or property, without due process of law, . . ."

Certainly when an individual stands for sentencing and the indictment is enlarged by considering accusations not premised on the indictment, and further the accusations are based on pure hearsay information, it seems to follow that he is being held to answer for a crime without a presentment or indictment. Also if this alleged activity is the basis for a crime under State Law he will be so

held to answer for the record as presented in the Federal Court by which he lacked means to prevent the exposure of this hearsay material due to the Government's zealous and ambitious attempt to convict him of being an all around no good person and as such, amounts to being twice subjected for the same offense and twice put in jeopardy of life and limb. Further, by the Government stepping out of bounds, so to speak, the Petitioner has been denied due process of law, as he has not had a chance to use ordinary rules of evidence in order to remove extremely prejudicial material from the Court's view in determining the sentence to be imposed on the Petitioner. We strongly feel, that if the Petitioner cannot question the evidence on a plea of guilty as the sentence is on the plea not the evidence, *United States* v. *Miller, supra,* it should follow that remarks made against the Petitioner as he stands before the Court for judgment, should be based on actual facts and stick within the immediate scope of the indictment.

We are well aware of the decision of *Williams* v. *New York,* 337 US 241 (1949) concerning the use of probationary reports for the purpose of evaluating the defendant so that the punishment fits the individual and not the crime. It is our opinion that the *Williams* case, *supra,* can be distinguished from the case at bar and also we would like to take issue with that case.

First of all we distinguish the *Williams* case from the case at bar on the issue of prejudicial error. In the *Williams* case the defendant was found guilty of murder by a jury after a trial and in the finding they recommended a sentence of life imprisonment. The trial judge imposed the death penalty after studying the probationary report and the question before the United States Supreme Court was narrowed to the point as to how a judge may obtain information to guide him in the imposition of a sentence

upon a convicted defendant in the realm of the state law. *Williams* v. *New York, supra* at page 244-245. The question of bias and prejudicial error was not before the Court for determination, as it is in the case at bar. In addition, the case at hand is further distinguished from the *Williams* case, *supra,* by the fact that here there was a plea of guilty to wilfully attempting to evade income tax, while in the *Williams* case there was a trial and the criminal activity that was incorporated into the probationary report was partially exposed during the trial. Even though the Court in the *Williams* case stated that hearsay material could be examined by the sentencing judge, it is still clear that this activity was alluded to during the trial.

The *Williams* case and the case at hand are further distinguished by the fact that the Trial Judge in the *Williams* case referred directly to a probationary report while in this case he did not or if he did there is no such indication on the face of the record, but on the contrary the Judge in this case adopted the thinking and presentation of the United States Attorney, which in fact had prejudicial effect on the sentence. As indicated in *Smith* v. *United States,* 223 F.2d 750 (CA 5th Cir. 1955) information in a probation service report made during a presentence investigation should be disclosed to the judge in open court and in the presence of the accused, citing Federal Rules of Criminal Procedure, Rule 32(c)(1) USCA, for the purpose of insuring fairness of the proceeding. This was not done in the case at bar.

Besides distinguishing the *Williams case, supra,* from the case before the Court, we take issue with the holding and philosophy of that case since we feel it is bad law. It has all of the elements of violating due process of law as well as going beyond the scope of the indictment. Many cases turn on the point of the discretion of the Trial Judge

in imposing the sentence and when the sentence falls within the statutory limitations the courts usually hold that there has been no abuse of discretion, however it also has been held that sentencing is not beyond the pale of Constitutional protection. *Smith* v. *United States,* 233 F2d 750 (CA 5th Cir. 1955); *Gundlack* v. *United States,* 262 F2d 72 (CA 4th Cir. 1958); *Pinedo* v. *United States,* 347 F2d 142 (CA 9th Cir. 1965). It is our contention that the Trial Judge should not be allowed to hide behind his discretionary powers when he has imposed a sentence upon a defendant in violation of that defendant's Constitutional rights.

Since the *Williams* v. *New York case, supra,* has been cited so frequently by most of the federal jurisdictions as controlling authority, we would like to draw the Court's attention to the lastest disposition of the defendant Williams. See *United States ex. rel. Williams* v. *Fay, Warden of Greenhaven Prison, N.Y.,* 323 F2d 65 (1963). In essence, the history of that case follows this pattern. The defendant's verdict from the highest court of New York was affirmed by the United States Supreme Court in *Williams* v. *New York,* 337 US 241 (1949) where the Court held that in imposing sentence the Judge is not restricted to information received in open court. Thus Williams' sentence of the death penalty was affirmed. The Governor of New York, then Governor Dewey, interceded and commuted the sentence from death to life imprisonment. Through a series of Writs of Habeas Corpus and appeals, the defendant after exhausting all state remedies was brought before the Federal District Court for the Southern District of New York via a Writ of Habeas Corpus and it was again denied on the merits. He took an appeal, which is reported in *323 F2d 65,* where the Court reversed the holding of the District Court based on the point that the confession used to convict the defendant had been obtained through

a violation of his constitutional rights. This holding prevailed as the United States Supreme Court refused to grant certiorari as reported in *381 US 945*. In effect, the holding of the Federal Circuit Court, reversing the conviction of Williams affects the decision of *Williams* v. *New York*, 337 US 241 (1949) and therefore the philosophy of the 1949 case should not have bearing on matters before the court today. We feel that by allowing the Trial Judge to incorporate, within his discretion, any material, even clearly hearsay material, disrupts the fair application of justice and violates the rules for fair and unbiased proceedings. Granted, some flexibility has to exist in imposing a sentence, however to increase or severely punish a defendant because of suspicion and undocumented remarks circumvents the basic rules of our judiciary.

There is great disparity in thinking as to the role of the sentencing judge as well as the power of the Court of Appeals in reviewing sentences among the Federal Judges. See for example, *26 FRD 231-283; 27 FRD 293-391; 30 FRD 185-328; 32 FRD 249-321; 35 FRD 381-509;* and *37 FRD 111-214*. These citations refer to the sentencing institutes that have been held in the last few years and presents the problems posed in evaluating conditions for the purposes of imposing sentences.

Our position is that some outline or guideline should be established which relates directly to the crime involved in determining what sentence is to be imposed. As was suggested by Judge J. Skelly Wright, a different standard should be imposed on the tax violator, as reported in his comments before the sentencing institute, reported in *30 FRD 302-306*. Judge Harlan H. Grooms in *30 FRD 306-310* discussed violation related to other crimes and in which he develops the *Pendergast case, supra*. His *own* philosophy would not allow him to go as far as Judge Otis, however, he does recognize the need for guidelines.

In essence, by our taking issue with the *Williams case, supra,* and the philosophy contained therein, we do not quarrel with the position that some flexibility in sentencing is needed, however, we feel that to go beyond the scope of the indictment and to consider accusations which are based on hearsay material, is clearly a denial of the Petitioner's Constitutional rights under the Fifth Amendment. Further, from a careful reading of the remarks of the Trial Judges participating at the sentencing institute clearly shows that some formula or guideline must be devised and an appellate review allowed with regard to the question of the extent of the Trial Judge's discretion.

In recapitulation we feel that the case at bar is clearly distinguished from *Williams* v. *New York, supra* on the question of prejudice and bias. The cases are further distinguished by the fact that Williams was tried by a jury, where in the case at bar, there was a plea of guilty to one count. Further, in *Williams* v. *New York, supra,* there was a direct reference to a probationary report, while the case at bar there was nothing to indicate that there was even a probationary report. If there was such a report before the Judge in the case at bar, we would like to direct the Court's attention to *Smith* v. *United States,* 223 F2d 750, (CA 5th Cir. 1955) citing Federal Rules of Criminal Procedure 18 U.S.C.A. Rule 32 (c) (1) where the "probation service's report of its presentence investigation shall not be submitted to the Court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty." That case further cites *Stephan* v. *United States,* 133 F2d 87, 100 (CA 6th Cir. 1943) where, "such information should have been disclosed to the Judge in open court and in the presence of appellant . . . We think that the interest of convicted persons about to be sentenced is more carefully safeguarded by open hearings under such rules as the Court may adopt."

The matter at hand, in our opinion, demonstrates that manifest injustice occurred as a result of the carelessness of the Trial Judge acting with a prejudicial and biased mind. The record does not indicate that a probationary report was used for the purposes of establishing the sentence, but it does indicate that the remarks of the United States Attorney were fully accepted to the detriment of jusice, and clearly to the detriment of the rights of the Petitioner.

In review of the position that we maintain with regard to this issue, we rely heavily on the philosophy and holding of the *Pendergast case, supra;* we further feel that the Trial Judge adopted the language of the United States Attorney and thus prejudicial error was committed and in fact interfered with justice being properly rendered; we further distinguish the holding of the *Williams case, supra,* from the case at bar as well as take issue with the holding of that case and finally conclude this issue with the position that manifest injustice has resulted causing harm to the Petitioner.

Third: THE PETITIONER WAS DENIED DUE PROCESS BY THE FACT THAT THE JUDGE CONSIDERED AND EMPHASIZED THE SOURCE AND THE AMOUNT OF INCOME.

In this issue we are mainly concerned with taking issue with the holding of *Williams* v. *New York, supra.* As developed in the prior issue, our contention is that the mere fact that the Petitioner was before the Trial Judge for purposes of imposing a sentence does not put him beyond the pale of his Constitutional rights. *Smith* v. *United States,* 223 F2d 750 (CA 5th Cir. 1955), *Swepston* v. *United States,* 289 F2d 166 (CA 8th Cir. 1961), *Gundlack* v. *United States,* 262 F2d 72 (CA 4th Cir. 1958), *Pinedo* v. *United*

States, 347 F2d 142 (CA 9th Cir. 1965). Since the alleged source of income was never established as a matter of valid fact, and the Petitioner only pleaded guilty to Count III of the indictment charging him with tax evasion, it was a violation of due process under the Fifth Amendment to go beyond the scope of the indictment. Further, as held by the *Pendergast case, supra,* it is improper to consider the alleged source of income and be highly influenced by such activity. The purpose of the indictment is to charge the individual with a given crime and the penalty should be geared for such violation. There is nothing within the indictment alleging this activity, therefore the punishment should not be meted out in recognition of this type of activity. Since this alleged activity does not constitute a crime under Federal Law an indictment could not be returned validly charging him with such activity, nor could he be sentenced for such activity, *United States* v. *Gallagher,* 94 F Supp 640 (DC WD Pa. 1950). However, with the facts at hand, it is clearly obvious that this Petitioner was sentenced because of the source of income.

In the case of *In re Murchison et. al.,* 349 U.S. 133, 136 cited in *Sheppard* v. *Maxwell,* 34 United States Law Week 4451, 4456 the court stated, "our system of law has always endeavored to prevent even the probability of unfairness." In that case the trial judge stated, "there is one thing the record does not show, and that was Mr. White's attitude, and I must say that his attitude was almost insolent in the manner in which he answered questions and his attitude upon the witness stand . . . Not only was the personal attitude insolent, but it was defiant, and I want to put that on the record." The defense counsel moved to strike these statements because they were not part of the original record and the Judge answered, "That is something . . . that wouldn't appear on the record, but it would be very evident

to the court." The Supreme Court in reversing the conviction in essence stated that due process requires the judge to be impartial in weighing the evidence presented before him, whereas in this case the judge called on his own personal knowledge and impression of what had occurred in the grand jury room and his judgment was based in part on this impression, the accuracy of which could not be tested by adequate cross examination. To a certain extent the same can be said for the matter at hand as the remarks of the United States Attorney and the Trial Judge are not subject to cross examination and all of the elements of unfairness of a proceeding are present. In *Connelly* v. *United States,* 191 F2d 692 (CA 9th Cir. 1954) the judge's biasness against the Communist party was held to be clearly personal against the party and deprived the judge jurisdiction to hear and determine any issue, bail or otherwise, affecting the party under this particular indictment. In *Whitaker* v. *McLean,* 118 F2d 596 (App. D.C. 1941) where there was a trial but with the absence of a jury, the court held that hostility is a form of bias. In *State* v. *Nunes,* — R.I. —, 205 A2d 24 (1964) the defendant was found guilty by a jury of assault with intent to commit rape. In the *Nunes case, supra,* while the judge was passing on a motion to revoke bail, he remarked that the defendant's acquittal of a charge of rape in a prior case was a miscarriage of justice, and the Supreme Court of Rhode Island stated that the remarks disclosed a prejudicial state of mind on the part of the judge and that the prejudice must have existed during the course of trial. In the *Nunes case, supra,* the question concerned the possibility of a mistrial due to the prejudice and bias of the trial judge, however the underlying philosophy of rendering a fair proceeding on up to the time of sentencing is present, and this is what we offer this case for. In the same spirit, we offer *Sheppard* v. *Maxwell,* 34 United States Law Week 4451

(1966) and we direct the Court's attention to note 11 on page 4458 referring to the judge's bias which was not reached as an argument because of the other prejudicial error, however the underlying theme here is again the denial of a fair and unbiased proceeding.

We have taken the position that when the Judge of the District Court considers hearsay material in imposing a sentence, he does so at the expense of the defendant's constitutional rights with regard to due process in violation of the Fifth Amendment. In effect, by allowing this course of procedure to transpire, the Petitioner is at the complete mercy of one individual, the Trial Judge, and as a result the Judge could conceivably act under any motive whatsoever and place this motive under the guise of his judicial discretion. The principles of our Constitution were not established under an autonomy, but under a form of checks and balances. It was recognized early in our country that the individual as a totalitarian became abusive as well as an obstruction to justice. This country took the position that some form of overseer should be provided for the protection of our form of government, and in this vein, the Trial Judge should not be able to hide behind his judicial discretion and become the first and final word over a judicial proceeding.

Further, the Courts were established for the purposes of affording a fair proceeding according to established rules, and the proceedings before the Courts of first instance were open to analysis by the appellate courts. It is conceded that as a matter of necessity the lower courts have to have some discretion in handling sentencing so as to remove the burden of endless litigation in the appellate courts. However, on review, abuses have taken place which question the validity of giving such wide authority to the trial judge under the guise of judicial discretion. As we pointed out earlier, there is a great difference of opinion

as to the role of the Trial Judges and as to the role of the Appellate Courts, which is reported in the various *Federal Rules Decision reports* concerning the sentencing institute forums.

Be as it may, it clearly seems to us that when a sentence is being imposed on a defendant, consideration of factors to determine the penalty should be limited to the matter before the Court as presented by the indictment, and not go to unproven accusations which are clearly hearsay.

Judge Otis provided an outline in which he had followed when he imposed sentence on the defendant. *United States* v. *Pendergast, supra.* This demonstrates a clear line of responsible thinking. Judge Otis' remarks as to why he did not consider the source of income indicated to a certain extent his desire to protect the rights of the defendant and further shows that to consider such activity would get away from the issue before the court. In that case, as well as the case at bar the only issue is tax evasion, and the punishment should be geared to meet that charge, not some other charge.

In review, the issue before the Court was tax evasion, not the alleged illegal activity. To get so involved with an undeniably prejudicial issue removed the charge as presented in the indictment and replaced it with a new issue. This clearly is beyond the realm of the Constitutional provisions as prescribed in the Fifth Amendment. In fact, as we stated earlier, the Constitution can be completely circumvented by the Trial Judge when he exercises his judicial discretion, as his prejudicial views can be blanketed under this discretion.

In essence, we take issue with *Williams* v. *New York, supra,* and state that error was committed in holding that hearsay material may be considered for purposes of sentencing.

Fourth: As to the Source and Amount of Income, the Petitioner Has Never Admitted To Partaking in This Type of Activity to a Federal or State Officer, Nor Has He Ever Been Convicted for the Source of This Income and This Will Be Further Supported by Affidavit. The Affidavit Is Attached and Designated as Appendix A at the End of This Brief.

The judgment and sentence must be responsive to and based on the offense with which the accused is charged. *United States* v. *Berkowitz,* 45 F Supp 564 (DC WD Mo. 1942). Since the charge of the alleged abortions was not included in the indictment, nor did the Petitioner ever admit to such activity, it was improper for the Court to consider such activity in rendering its decision. We feel that since this activity was not established as a matter of fact, it was outside the scope of review of the Trial Judge.

We have taken two positions with regard to considering factors for purposes of imposing sentence, as pertaining to this alleged source of income. Firstly, that it was improper to even consider these accusations as based on the *Pendergast case, supra.* Secondly, that it should not have been considered from the standpoint that it had not been established as a matter of fact that such was the case, but rather these remarks were all hearsay remarks.

The Petitioner refused to discuss this matter with Federal officers. As a matter of law it is a recognized principle that silence does not admit guilt, nor does a defendant's refusal to take the stand admit guilt to the charge, and under the same theme as prescribed by the Constitution the defendant does not have to be a witness against himself. Again, returning back to the theme of this whole petition, the charge was tax evasion and not the alleged illegal activity. Therefore, it is unnecessary for the Petitioner to answer questions which do not pertain to the charges

against him. These considerations are clearly improper and should be deleted from the mind of the Court.

The indictment charged the Petitioner with wilfully attempting to evade a substantial amount of tax and the Petitioner by pleading guilty to Count III admits to wilful evasion of income tax. However, before the amount can be firmly established as a matter of fact, the Government through civil proceedings has to show the actual amount received and the Petitioner is given an opportunity to disprove the figures presented by the Government. It therefore follows that the position of the Court on a criminal proceeding should be to pass on the wilfully attempting to evade income tax and leave the amount of income tax to be imposed for a civil proceeding. In effect, the Court should not be unduly concerned with the amount stated in the indictment as this amount in all probability will be greatly changed.

In review, with regard to the alleged source of income, reference to such jeopardized a fair and reasonable decision on behalf of the Trial Judge when he imposed the sentence. We feel that since there is a sworn affidavit by the Petitioner with regard to his position with the alleged source of income which in essence supports the position that we have taken in that all of the remarks of the United States Atforney were based on hearsay material and out of the realm of fact. We would like to draw the Court's attention to *Bloch* v. *United States,* 221 F.2d 786, 790 (CA 9th Cir. 1955) where the Court discussed jury instruction, which is distinguished from the case at bar but by dictum the Court stated it's feelings of the tactics employed by the Government Attorney in asking prejudicial questions. The Court stated;

> "The practice of attempting to convict a defendant not of the crime of which he is charged, but rather of being

an all around, no good dissolute person, is foreign to our system and is disapproved by this Court."

In this regard, we feel that the remarks of the United States Attorney, which were adopted into the thinking of the Trial Judge, attempted to sentence the Petitioner for being an all around, no good dissolute person.

In essence, we hope to convey by the introduction of the affidavit, that the references to the source of income and amount of income, were not based on facts, but on purely hearsay material.

Fifth: THE REMARKS OF THE UNITED STATES ATTORNEY AS TO THE EXPENSES WHICH WOULD OFFSET THIS INCOME ARE PREJUDICIAL AND UNWARRANTED, AND FURTHER NOT BASED UPON ACTUAL FACTS.

This issue goes to the reference of the United States Attorney citing a figure of $97,752.10 which he purports to originate from the Petitioner's own records and from testimony from certain individuals involved. The actual figures involved will be determined through a civil proceeding, which according to the Government's procedure follows the criminal proceeding of wilfull evasion. It is therefore improper for the Government to argue or present figures which as a matter of course will be greatly altered during the civil handling of this case. Since the figures involved have to be determined through a civil proceeding, and this order has been presented by the Government, it is our position that the United States Attorney emphasized very strongly prejudicial matter which seriously affected the standing of the Petition before the Court. The Government even admitted that there were some expenses to determine and thus affect the final taxable amount, however this has not been established, nor has the Petitioner

been presented with an opportunity to offset the total amount. We feel that a proper determination for the total amount should be left to a civil proceeding and not for the punishing court on a criminal matter concerning the wilfull attempt to evade income tax. The purpose of the statute, Section 7201, I.R.S. Code; 26 U.S.C.A. Section 7201 is to determine wilfull tax evasion and it does not make any difference whether the evasion is one dollar or one million dollars. The wrong has been committed, of which the Petitioner has pleaded guilty, however, undue emphasis placed on such amount takes the charge out of its context. This is apparent from the remarks of the Trial Judge when he states that, "*It is obvious to the Court a very substantial amount of money was involved here. In the light of the amount involved. . .*" (emphasis ours) We feel that by the undue emphasis placed on the factor of amount of income by the United States Attorney, that the Judge was unduly swayed by the staggering amount. Granted a substantial amount of a figure was presented in the indictment, however this figure is not absolute, as it is used primarily for the purpose to substantiate the charge of wilfully attempting to evade income tax, as a tax amount has to be presented, even though the figure does not have to be fully proved by the Government to fulfill the tax evasion charge. As we stated earlier, the sentence is based on the plea, not on the evidence. *United States* v. *Miller,* 254 F.2d 523, citing *United States* v. *Gallagher,* 183 F.2d 342. Further, that "as a matter of law the Court would not condone the use of evidence obtained in breach of the law, even for the limited purpose of determining the sentence." *Armpriester* v. *United States,* 256 F.2d 294.

The practice of attempting to convict a defendant not of the crime of which he is charged, but rather of being an all around, no good dissolute person is foreign to our

system and is disapproved by the Court. *Bloch* v. *United States,* 221 F.2d 786 (CA 9th Cir. 1955) petition for rehearing denied 223 F.2d 297. In the same vein with regard to the emphasis supplied to the amount of income by the United States Attorney and the Court, indicates that the Petitioner was being viewed as an all around dissolute person. Since the exact amount of the alleged unreported net income and unpaid tax is unimportant, and the government need not prove the full deficiency alleged, but only a portion of said deficiency, it follows that, to strongly emphasize the alleged amount of income puts an undue burden on the Petitioner. See *United States* v. *Johnson,* 319 U.S. 503, 517 where the Court states: "Of course the government did not have to prove the exact amount of the unreported income by Johnson." Our position is that the Petitioner here pleaded guilty to wilfully and knowingly attempt to evade a large part of the income tax due and owing by him, of which this is the crux of the charge, thus the Court should not be overly concerned with the alleged amount due. The sum of money alleged in the indictment is subject to dispute and in all probability will be substantially reduced when this is presented for civil proceedings.

We contend, therefore, that while the figure is included in the indictment, its effect on this criminal proceeding should be minimized as this Court is aware that the figure is flexible and could change substantially when the tax is ultimately determined.

Sixth: THE REMARKS OF THE TRIAL JUDGE EMPHASIZING THE SOURCE OF INCOME, IN EFFECT IMPOSED A DOUBLE PENALTY OR THE POSSIBILITY OF A DOUBLE PENALTY, BECAUSE IT IS APPARENT THAT THE TRIAL JUDGE PLACED UNDUE EMPHASIS ON THE ACTIVITY WHICH IS NOT A FEDERAL OFFENSE, NOR IS THIS ACTIVITY IN ISSUE.

Our position here is that the fine and imprisonment were imposed because of this alleged source of income. In effect, the sentence creates a new federal crime, that of the crime of abortion. Our argument is based on the position that the Petitioner faces a charge in the State Court, and if he is found guilty, he will face an additional punishment, but in fact it will be the same punishment he faces in the federal jurisdiction. In the Sentencing Institute reports as reported in the Federal Rules Decision reports, one of the factors to consider in imposing sentence, is the State penalty, and the Federal penalty should not have the effect of imposing a double penalty on the Petitioner.

In essence, our view is that the Trial Judge failed to consider the role of the State Court in its jurisdiction over this particular question. In fact, the emphasis was so strong as to the source of income, that this Court (Federal District Court) usurped jurisdiction from the State Court, and imposed a penalty on the Petitioner for his alleged involvement in this type of activity. If the State imposes a penalty, the Petitioner will, in fact, be forced to serve a double penalty for the same activity.

Seventh: THE REMARKS OF THE TRIAL JUDGE, THAT HAD HE GONE TO TRIAL HE UNDOUBTEDLY WOULD BE FOUND GUILTY BY A JURY, INDICATED BIAS AND PREJUDICIAL ERROR, WHICH AMOUNTED TO REVERSIBLE ERROR.

The Trial Justice commenting on the factor that had the case gone to trial this case would consume a substantial

amount of time, stated that, *"but the defendant would then be undoubtedly found guilty by a jury and be before me for sentence on three counts, not on one as he is here today."* (page 9a) (emphasis ours) This is clear fallacy and predisposition. The Trial Judge had no idea whatsoever what type of defense the Petitioner had prepared and for him to remark that the Petitioner would then be undoubtedly found guilty indicates a pre-disposed mind. Based on the indictment alone, without the plea of guilty, it is obvious that the Trial Judge had pre-judged the Petitioner guilty of the crime. This statement, in conjunction with the other remarks that we have pointed out, demonstrate the prejudice and bias that the Trial Judge held against the Petitioner. In this framework, we strongly feel that it was impossible for the Trial Judge to render a fair and just sentence.

It is our contention, as evidenced by the remarks singled out, that the Trial Judge was ultra-concerned with the accusations against the Petitioner and that he had him made out as being a bad fellow. See the *dissent* in *Rutkin* v. *United States,* 343 U.S. 130, 139, where Justice Black, who is joined by Justice Reed, Justice Frankfurter and Justice Douglas, discusses the inappropriateness of using a charge of tax evasion to attack some other activity. At page 144 he states;

> "... When faced with specific federal legislation, such differences in treatment may be inevitable, but I do not think the tax laws should be judicially extended for the purpose of taking from local officials the responsibility for prosecuting local offenses. When the Government takes over a case like the one before us, the resulting confusion of issues is manifestly prejudicial to the defendant. Here, for instance, it can hardly be said that Rutkin was tried for tax evasion..."

Justice Black goes on then to develop the highly inflammatory language used by the Government with regard to the defendant's activity. The purpose of the Government was to develop the defendant as a scoundrel and of general bad character.

In the same context, the language of the Government and the Court demonstrate their ultra-concern about the accusations made against the Petitioner. In essence the Court has committed prejudicial error by catering to these careless and highly biased remarks made by the United States Attorney. All of the remarks taken together suggest that the Trial Judge was confused as to the duty imposed upon him when he imposed this sentence. We feel that in his frame of mind, it was impossible for the Judge to render a fair decision with regard to the punishment to be imposed on this Petitioner. In fact, this is clearly more than an abuse of discretion on the part of the Trial Judge, but rather an invalid sentence based on a violation of the Petitioner's Constitutional rights concerning the Fifth Amendment.

In total recapitulation, it is our position that the United States Attorney went out of bounds in arguing his plea. He, in effect, created a state of confusion by removing the issue of tax evasion and replaced it with the alleged crime of abortion. It is improper to use a tax evasion charge as a vehicle to get a conviction on a state charge which is purely outside the Federal Law. *United States* v. *Pendergast, supra, Rutkin* v. *United States, supra, (dissent* by Justice Black.)

Further, the United States Attorney based his accusations on hearsay material for the purpose of inflaming the mind of the Trial Judge and thus affect the decision ultimately reached. All of this information should have been ignored and removed from the proceedings, but since it has not, reversible error has been committed. We have

cited *Williams* v. *New York, supra,* for purposes of distinguishing it from the matter at hand as well as taking issue with the holding of the Court. We feel that to allow hearsay material to come in for purposes of imposing the sentence, expands the scope of the indictment and confuses the matter before the judge so as to put an entirely new element into issue. We contend that in *Williams* v. *New York, supra,* the issue of bias and prejudice was lacking, that the question before the Court was the use of a probationary report, not the accusations of the United States Attorney while the matter in this case is based entirely on a plea of guilty, not on a conviction after trial. It is our contention that all of these distinguishing factors as well as the decision of *United States* v. *Pendergast, supra,* indicate that the remarks of the Government were inflammatory and that the Petitioner was improperly before the Judge as the indictment should have charged him with abortion rather than tax evasion.

It is also our contention that the remarks being prejudicial and biased, inflamed the mind of the Trial Judge tot he extent that he could not render a fair and just sentence. The language he used, we feel, demonstrated his feelings toward the alleged activity of the petitioner and to the degree that he was punishing him for this activity rather than tax evasion. It has been reported to us by the United States Attorney that in his time as United States Attorney for the District of Rhode Island, the Trial Judge has never imposed an imprisonment for a tax evasion case. The fact that he did impose a sentence in this case, where he had not in the past, demonstrates to us that he was ultra-concerned over the accusations against the Petitioner as to the alleged source of income rather than the charge of tax evasion. A Trial Judge should not use his power over a defendant before him on a tax evasion charge to punish this individual for

accusations of a crime that pertain only to the State Law as a crime within that state. If this were not so, the defendant in effect would be exposed to a double penalty, for if he is found guilty in the State court and is imprisoned, the effect of serving an imprisonment under the federal charge amounts to punishing him twice for the same offense. As Justice Black in his *dissent* in *Rutkin* v. *United States, supra,* said it leaves a defendant faced with the burden of defending three separate prosecutions (national, state and municipal prosecutions); that, in effect, by the federal government exercising their authority under the heading of tax evasion, are interfering with the responsibility of local officers and in reality are convicting the defendant for being a scoundrel or bad individual rather than a tax evader. Judge Otis in *the Pendergast case, supra,* stated in essence that the sentence should be determined outside prejudicial factors that would implicate the defendant with a score of crimes not included in the indictment. We strongly feel that by considering these elements, in the manner in which the Trial Judge did, amounted to punishing the Petitioner for the charge of abortion, when in fact there is no federal crime of abortion. Further, that he is putting the Petitioner in the position of being exposed to a double punishment.

We further contend that the Petitioner has never admitted to the charge of the alleged source of income, that in fact, all references to such source are based on speculation and conjecture. It is true that there is a State charge against the Petitioner for such activity, however, it is our position that proof of such should be left to be deliberated and determined by the State Court, not this Court.

With regard to the alleged amount of income and tax due, referred to in the indictment and emphasized by the United States Attorney, we strongly feel that it has been

overly emphasized. It is our position that by such a strong emphasis placed on the amount of income, that this element was taken out of context. The government conceded that some expenditure would enter into final determination, which they naturally minimized. We feel that by strongly emphasizing this sum as though it was established as a matter of fact, that the Government placed a prejudicial and detrimental factor on the Petitioner, which amounted to harmful error.

The remarks of the United States Attorney as to the amount of income, which we contend were highly prejudicial, were fully accepted by the Trial Judge and, therefore, the Judge was not of a clear and free mind when he rendered his decision. By the remarks of the Trial Judge stating that "in the light of the amount involved," we feel that he placed undue emphasis on this alleged amount of money to the detriment of the Petitioner. Since he was highly influenced by this staggering amount of income, which had not been established as a matter of fact, but left open to conjecture, we feel that the decision of the Trial Judge reached error and was invalid due to the reliance on prejudicial material.

It is also our position that the Trial Judge in effect, imposed the possibility of a double penalty on the Petitioner due to his strong emphasis on the alleged source of income. By being so concerned over this alleged source of income, he in effect, broadened the scope of the indictment and, in effect, sentenced and fined the Petitioner because of this activity. Since the Petitioner has to answer to the State for this activity, it is apparent that if he is found guilty, he will be punished twice for the same activity. This clearly is undue and harsh punishment. We feel that the rendering of a decision as to this activity should be left to the State for determination and deliberation.

Lastly, we contend that the careless remarks of the Trial Judge, that had he gone to trial he undoubtedly would be found guilty by a Jury, indicated that his mind was made up of the Petitioner's guilt. He, in essence, is removing the fairness of the proceeding by demonstrating his prejudicial feelings toward the Petitioner. We direct the Court's attention to our remarks on the Petitioner's behalf for purposes of mitigating the Petitioner's punishment. (page 5a-8a) We ask that you compare the remarks made on behalf of the Petitioner to the remarks of Judge Otis in *United States* v. *Pendergast, supra,* at page 605 where he makes allowances for such considerations as mitigating circumstances. However, with the case at bar the Trial Judge ignores the plight of the Petitioner and, in fact, states that these were all considerations that should have been in the mind of this Petitioner when he engaged in this activity that resulted in the income which he apparently sought to evade the payment of taxes. To our line of thinking, this further evidences and manifests the hard line of thinking of the Trial Judge which can be attributed to his own sensitive feeling concerning this alleged source of income. We feel that the position taken by Judge Otis is much more sensible and arrives at administering justice in a manner commendable to the dignity of the Bench.

Conclusion

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JACOB J. ALPRIN
RALPH C. DELUCA
111 Westminster Street
Providence, Rhode Island
Counsel for Petitioner

June 1966

Appendix A

Thereafter, on June 9, 1966, the following judgment was entered:

> This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel.
>
> Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.
>
> By the Court:
>
> (s) ROGER A. STINCHFIELD
>
> *Clerk.*

Enter:

(s) ALDRICH, Ch.J.

Appendix B

Statutes Involved

18 U.S.C.A. Rule 32. Sentence and Judgment (c) Presentence Investigation

(1) When Made. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

26 U.S.C.A. § 7201. Attempt to evade or defeat tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the cost of prosecution . . . .

26 U.S.C.A. § 7206. Fraud and false statements

Any person who—

(1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Aid or assistance.—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or

required to present such return, affidavit, claim, or document; or

(3) Fraudulent bonds, permits, and entries.—Simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, or procures the same to be falsely or fraudulently executed, or advises, aids in, or connives at such execution thereof; or

(4) Removal or concealment with intent to defraud.—Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title; or

(5) Compromises and closing agreements.—In connection with any compromises under section 7122, or offer of such compromise, or in connection with any closing agreement under section 7121, or offer to enter into any such agreement, willfully—

(A) Concealment of property.—Conceals from any officer or employee of the United States any property belonging to the estate of a taxpayer or other person liable in respect of the tax, or

(B) Withholding, falsifying, and destroying records.— Receives, withholds, destroys, mutilates, or falsifies any book, document, or record, or makes any false statement, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax;

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 852.

28 U.S.C.A. § 1254, Court of appeals; certiorari; appeal; certified quesitons.

Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

Appendix C

AFFIDAVIT

I, Anthony Altieri, Jr., of the Town of Johnston, County of Providence, State of Rhode Island, on oath make affidavit and say, that I never at any time admitted to the activity of abortion to any Federal or State officer; that any reference to abortion ever made by me was in response to a question presented by the Federal Probation Officer as to the nature of the State charge pending against me; that I had never been convicted of the crime of abortion; that I did not plead guilty to the source of income; that at the time I pleaded guilty to the charge of wilfull evasion of income tax and prior thereto, I had never stated that these earnings were derived from the alleged source of income as referred to by the United States Attorney; that I was informed by my attorneys that the United States Attorney stated that in five years in this office, Judge Day had never imposed a sentence upon a tax evasion charge.

(s) ANTHONY ALTIERI, JR.

Subscribed and sworn to before me at Providence, Rhode Island this 13th day of April, A.D. 1966.

(s) JACOB J. ALPRIN
Notary Public
(SEAL)

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 324

ANTHONY ALTIERI, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In December, 1965, petitioner was indicted in the United States District Court for the District of Rhode Island on three counts of wilfully attempting to evade his income taxes in violation of Section 7201 of the Internal Revenue Code of 1954. Upon arraignment he pled guilty to Count III, relating to the year 1963, and not guilty to the other two counts. He was sentenced to a 15-month prison term and was fined $5,000. (Pet. 3-4; R. 1a.) When petitioner appeared

for sentencing the United States Attorney advised the court, *inter alia*, that the source of the unreported income alleged in the indictment was an abortion mill operated by petitioner, and that he had performed 249 abortions in 1963 alone, for which he had received fees ranging from $250 to $1,300. (R. 3a.)

Petitioner did not object to the United States Attorney's reference to his abortion practice. Rather his counsel sought to turn it to his advantage in these words (R. 6a):

> * * * one of the primary motives that this defendant had in pleading guilty to this charge was the fact that there are a number of people that would be hurt if this went to trial. These girls, your Honor, would have to come into court and testify and they would be hurt; not only they, but their spouses, their husbands, your Honor, their families. And that is an important consideration, your Honor.
>
> Secondly, that particular charge, the source of the income, the abortion, your Honor, this is something that this man still has to face. He has a charge pending in the state court on that, and it would appear to me that if this were taken into consideration today, your Honor, the penalty would be imposed upon him twice: here and also in the state court.[1]

Petitioner's present contention, that the United States Attorney committed reversible error in apprising the court of the source of the unreported income,

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[1] On two subsequent occasions defense counsel also argued in mitigation of sentence that the petitioner was facing abortion charges in the state court. (R. 7a, 8a.)

is wholly without merit. Even on the issue of petitioner's guilt or innocence such evidence would have been relevant and admissible, although it might also show the commission of other crimes. *Armstrong* v. *United States*, 327 F. 2d 189, 194 (C.A. 9); *United States* v. *Chapman*, 168 F. 2d 997, 1001 (C.A. 7), certiorari denied, 335 U.S. 853; *United States* v. *Guidarelli*, 318 F. 2d 523 (C.A. 2). *A fortiori*, the trial judge was fully justified in taking it into account, if he did so, on the question of what sentence should be imposed.[2] A court has wider latitude of inquiry in fixing the sentence during a contest to decide the issue of guilt. *Williams* v. *New York*, 337 U.S. 241, 246; *Armpriester* v. *United States*, 256 F. 2d 294, 297 (C.A. 4). In the *Williams* case this Court stated (337 U.S. at 247):

> A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts

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[2] The prison sentence of 15 months is well within the five-year maximum provided by Section 7201. There is no showing in the record that the imposition of that sentence resulted from the disclosures of the United States Attorney as to source of income. In an affidavit filed with the court of appeals, the U. S. Attorney flatly denied having advised defense counsel that Judge Day had never imposed a prison sentence in a tax evasion case. (Appendix A, *infra*, p. 6.)

> individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherance to restrictive rules of evidence properly applicable to the trial.
>
> Undoubtedly the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. * * *

This record does not disclose whether there was a pre-sentence investigation resulting in a probation report,[3] but we submit that no more harm could have come from the United States Attorney's recitation of the facts in question than if they had been recited in such a report. A probation report will certainly give the social and economic background of a defendant, including the fundamental matter of how he earns his living, and the nature of charges pending against him in a state court. Moreover, if such information is contained in a probation report the defendant may have no opportunity to contradict or rebut it. *Hoover* v. *United States*, 268 F. 2d 787, 790 (C.A. 10). In the instant case petitioner had every opportunity to contradict or rebut the allegations but chose not to do so.

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[3] See Rule 32(c)(2) of the Federal Rules of Criminal Procedure. The fact that petitioner indicates he was interviewed by a federal probation official suggests that the court did have the advantage of a probation report. (Pet. App. C.)

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

MEYER ROTHWACKS,
RICHARD B. BUHRMAN,
Attorneys.

AUGUST 1966.

APPENDIX A

State of Rhode Island
Providence, Sc.

AFFIDAVIT

I, RAYMOND J. PETTINE, of the City and County of Providence, State of Rhode Island, being duly sworn, on solemn oath depose and say:

That I am United States Attorney for the District of Rhode Island and have occupied that office since April 19, 1961. Likewise, I occupied said office in the months of January and February, 1966. In those months, I had occasions to discuss the case of the United States of America v. Anthony Altieri, Jr., et al., Indictment No. 7238, pending before the United States District Court for the District of Rhode Island, with attorneys for the defendant, Anthony Altieri, Jr. In no discussion with any of the attorneys did I represent that in my term of office Judge Edward W. Day, Judge of said District, did not impose a sentence upon a tax evasion charge. To the contrary, I unequivocally state that I represented to said attorneys that it was not my prerogative to assume what sentence the Court might impose and that in my experience it was not Judge Day's practice to indicate what sentence he would impose.

It would have been impossible for me to represent that the Court never imposed sentence upon a tax evasion charge in the period in which I have occupied the office of the United States Attorney since such a statement would conflict with the record and truth.

/s/ RAYMOND J. PETTINE

State of Rhode Island
Providence, Sc.

Sworn and subscribed to before me at Providence, Rhode Island, this 10th day of May, 1966.

/s/ WILLIAM J. GEARON
Notary Public. [SEAL]
My Commission Expires 6/30/66

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